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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 183

HENRY W. TAFT AND JULIA W. S. TAFT,
PETITIONERS,

vs.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 26, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1940.

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 90,321

HENRY W. TAFT and JULIA W. S. TAFT, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Henry W. Taft, Esq., Clarence Castimore, Esq.,
For Comm'r: S. U. Hiken, Esq.

DOCKET ENTRIES

1937

Aug. 19. Petition received and filed. Taxpayer notified (Fee paid).
Aug. 19. Copy of petition served on General Counsel.
Sept. 10. Answer filed by General Counsel.
Sept. 10. Motion for circuit hearing at New York City filed by General Counsel. 9/13/37 granted.
Sept. 14. Copy of answer served on taxpayer.

1938

Nov. 16. Hearing set Jan. 9, 1939, New York, N. Y.

1939

Jan. 9. Hearing had before Mr. Hill, Div. 2, on the merits. Submitted. Pets'. brief 30 days; Respondent's brief 30 days; Petitioners' reply brief 15 days.
Jan. 23. Transcript of hearing of Jan. 9, 1939 filed.
Feb. 7. Brief filed by taxpayer. 2/7/39 copy served on General Counsel.

[fol. 2]

Mar. 10. Brief filed by General Counsel.
July 13. Opinion rendered, Sam B. Hill, Div. 2. Decision will be entered for the respondent.
July 17. Decision entered, Sam B. Hill, Div. 2.
Oct. 11. Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Oct. 11. Proof of service filed by taxpayer.
Dec. 2. Agreed statement of evidence lodged.
Dec. 2. Agreed praecipe for record filed—with proof of service thereon.
Dec. 4. Agreed statement of evidence approved and ordered filed.
Dec. 6. Order enlarging time to December 20, 1939, for transmission and delivery of record, entered.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION

The above-named taxpayers hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated June 9, 1937, and as a basis for the proceeding allege as follows:

First. Petitioners are individuals, husband and wife, and are residents of New York, N. Y., and their mailing address is c/o Messrs. Cadwalader, Wickersham & Taft, 14 Wall Street, New York, N. Y.

Second. The notice of deficiency (a copy of which is attached hereto marked Exhibit "A") was mailed to the petitioners on or about June 9, 1937.

Third. The taxes in controversy are income taxes for the calendar year 1934 in the amount of $722.79 and for the calendar year 1935 in the amount of $827.17.

Fourth. The Commissioner erred in his determination set forth in the said notice of deficiency in the following particulars:

(a) In disallowing a deduction from gross income for charitable contributions during the year 1934 in the amount of $1,475.19.

(b) In disallowing a deduction from gross income for charitable contributions during the year 1935 in the amount of $1,543.50.

[fol. 4] Fifth. The facts upon which the petitioners rely as a basis for this proceeding are as follows:

(a) Petitioners, husband and wife, are citizens of the United States, and residents of the City of New York.

(b) Petitioners filed a joint return for the year 1934 reporting net income in the amount of $83,682.99 and claiming deductions in the amount of $2,852 for charitable contributions, of which $1,477 was shown as "made by" Mrs. Taft, one of your petitioners.

(c) Mrs. Taft's net income for the year 1934 was $12.10 being dividends on six shares of Continental Can Company common stock, the only security then owned by her. The Commissioner disallowed so much of the $1,477 as exceeded 15% of $12.10, i. e., $1,475.19.

(d) During the year 1934, Mrs. Taft had no funds from which she could have made contributions other than money furnished to her by her husband, Mr. Taft, except the $12.10 referred to above.

(e) Petitioners filed a joint return for the year 1935 reporting net income in the amount of $92,374.59 and claiming deductions in the amount of $2,715.80 for charitable contributions of which amount $1,545.80 was shown as "made by" Mrs. Taft, one of your petitioners.

(f) Mrs. Taft had net income for the calendar year 1935 in the amount of $15.30 being dividends received on six shares of Continental Can Company, referred to above. This was the only security that Mrs. Taft held during the year 1935. The Commissioner disallowed so much of the said contribution of $1,545.80 as exceeded 15% of the said $15.30, to wit, $1,543.50.

(g) During the year 1935, Mrs. Taft had no funds from which she could have made such charitable contributions other than monies furnished to her by Mr. Taft, except the $15.30 above mentioned.

[fol. 5] (h) From time to time during the years 1934 and 1935, as was his custom, Mr. Taft paid over to Mrs. Taft various sums of money. Generally $500 was paid on the first of each month and $250 in the middle of the month, although sometimes these sums were supplemented by additional sums which he furnished to her. This was a practice of many years standing. Mrs. Taft banked the money so received from her husband in her own name for her own

personal convenience. This money was turned over to Mrs. Taft by her husband with the express knowledge and distinct understanding that some of it would be devoted by her to charity. For many years the petitioners had adopted a policy of devoting a portion of the family income to charitable uses, and it was mutually understood that the total amount of contributions to be made by Mrs. Taft would aggregate about the same amount each year. Petitioners never considered the charitable gifts made in the name of Mrs. Taft, or reported by her as so made, to be purely personal gifts by her, but they were regarded as a community or family gift in which Mrs. Taft determined the amount and the organizations with respect to charities with which she was familiar or in which she had an interest, while Mr. Taft gave, in his own name, to other organizations with which he was familiar or in which he had a particular interest. That this mutual understanding between these petitioners was in fact carried out is shown by the contributions made under Mrs. Taft's name for a period of years. Thus, in 1931 the charitable contributions made under her name amounted to $1,506, in 1932, $1,210, in 1933, $1,628, in 1934, $1,477 and in 1935, $1,545.80. As Mrs. Taft did not have any income producing properties of her own except the very small amount of stock referred to above, nor any other separate funds, the money with which these charitable contributions were made came from one source only, that is [fol. 6] from the funds turned over to her by Mr. Taft in accordance with the custom and understanding referred to above, and with the express knowledge that a portion of them would be used for charitable purposes, in accordance with that understanding.

(i) Petitioners are informed and verily believe that the said sums of $1,475.19 and $1,543.50 disallowed by the Commissioner, referred to in paragraph 4 hereof, are proper deductions from the gross income of your petitioners for the years, 1934 and 1935 respectively.

Wherefore, your petitioners pray that the Board may hear this proceeding and determine the matters herein above set forth and find that here is no deficiency, and grant such other and further relief as to the Board may seem just and equitable.

Henry W. Taft, Per se, Clarence Castimore, Counsel for Petitioners, 14 Wall Street, New York, N. Y.

[fol. 7] *Duly sworn to by Julia W. S. Taft and Henry W. Taft. Jurats omitted in printing.*

[fol. 8] EXHIBIT "A" TO PETITION

(Letterhead of)

SN-N. Jun. 9, 1937.

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue.
And refer to Mr. Henry W. Taft and Mrs. Julia W. S. Taft, 14 Wall Street, New York, New York.

Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 and 1935 discloses a deficiency of $1,549.96 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the [fol. 9] attention of IT:CI:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner,
(Signed) By Chas. T. Russell, Deputy Commissioner.

Enclosures: Statement Form 870

STATEMENT

IT:A:1
MHK-90D

In re: Mr. Henry W. Taft and Mrs. Julia W. S. Taft,
14 Wall Street, New York, New York.

Tax Liability for Taxable Years Ended
December 31, 1934 and 1935

Income Tax	Liability	Assessed	Deficiency
1934	$22,209.65	$21,486.86	$ 722.79
1935	26,490.00	25,662.83	827.17
Totals	$48,699.65	$47,149.69	$1,549.96

[fol. 10] The deficiency shown herein is based upon the reports dated May 29, 1936 and January 19, 1937, prepared by Internal Revenue Agent W. C. Baptist and Louis Keifer, copies of which were transmitted to you.

Careful consideration has been given your protests dated July 16, 1936, November 12, 1936 and February 10, 1937, in connection with the report of the internal revenue agent in charge at 17 Battery Place, New York, the information submitted at the conference held in the internal revenue agent's office on December 4, 1936, and the conference held in this office March 4, 1937.

1934

Net income reported on return (Husband and wife)	$83,682.99
Add:	
Contributions disallowed	1,475.19
Adjusted net income	$85,158.18

Explanation of Change

Contributions amounting to $1,477.00 made by Mrs. Taft have been decreased $1.81, which amount represents 15 per cent of her total net income of $12.10. This adjustment is in accordance with the provisions of article 23(o)(1) and section 23 of the Revenue Act of 1934 which provides as follows:

"Whether a husband and wife make a joint return or separate returns, the 15 per cent limitation on the deduction

for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts."

[fol. 11] Computation of Tax

Adjusted net income			$85,158.18
Less:			
Personal exemption			2,500.00
Surtax net income			$82,658.18
Less:			
Dividends		$17,661.48	
Earned income credit (10% of $14,000.00)	$1,400.00		
10% of $12.10	1.21		
		1,401.21	
			19,062.69
Income subject to normal tax			$63,595.49
Normal tax at 4% on $63,595.49			$ 2,543.82
Surtax on $82,658.18			19,696.18
Total Tax			$22,240.00
Less:			
Income tax paid at source			30.35
Correct tax liability			$22,209.65
Previous assessment, account #200937			21,486.86
Deficiency			$ 722.79

Mr. Henry W. Taft and
Mrs. Julia W. S. Taft — Statement.

[fol. 12] 1935

Net income reported on return	$92,374.59
Add:	
Contributions disallowed	1,543.50
Adjusted net income	$93,918.09

Explanation of Change

In accordance with the provisions of article 23(o)(1) of the Revenue Act of 1934, the contributions of $1,545.80 claimed by Mrs. Taft have been decreased to $2.30, which represents 15 per cent of her total net income.

When the husband and wife make a joint return or separate returns the 15 per cent limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions.

Computation of Tax

Adjusted net income			$93,918.09
Less:			
Personal exemption			2,500.00
Surtax net income			$91,418.09
Less:			
Dividends		$19,630.49	
Earned income credit			
(10% of $14,000.00)	$1,400.00		
10% of $13.00	1.30		
		1,401.30	
			21,031.79
[fol. 13] Income subject to normal tax			$70,386.30
Normal tax at 4% on $70,386.30			$ 2,815.45
Surtax on $91,418.09			23,709.05
Total tax			$26,524.50

Mr. Henry W. Taft and
Mrs. Julia W. S. Taft. — Statement.

Brought forward	$26,524.50
Less:	
Income tax paid at source	34.50
Correct tax liability	$26,490.00

Tax previously assessed, account #203674	25,662.83
Deficiency	$ 827.17

[fol. 14] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition in the above-entitled proceeding, admits and denies as follows:

First, Second and Third. Admits the allegations contained in paragraphs First, Second and Third of the petition.

Fourth. Denies the assignments of error contained in subparagraphs (a) and (b) of paragraph Fourth of the petition.

Fifth. Admits the allegations contained in subparagraph (a) of paragraph Fifth of the petition.

Admits the allegations contained in subparagraph (b) of paragraph Fifth of the petition, but denies that Mrs. Taft is entitled to the deduction of $1,477.00 for charitable contributions as claimed in said subparagraph.

Admits that respondent disallowed so much of the said $1,477.00 ([b] above) as exceeded 15% of $12.10. For lack of information as to the actual facts respondent denies the remaining allegations contained in subparagraph (c) of paragraph Fifth of the petition.

For lack of information as to the actual facts respondent denies the allegations contained in subparagraph (d) of paragraph Fifth of the petition.

[fol. 15] Admits the allegations contained in subparagraph (e) of paragraph Fifth of th petition, but denies that Mrs. Taft is entitled to the deduction of $1,545.80 for charitable contributions, as claimed in said subparagraph.

Admits that respondent disallowed so much of the said $1,545.80 ([e] above) as exceeded 15% of $15.30. For

lack of information as to the actual facts respondent denies the remaining allegations contained in subparagraph (f) of paragraph Fifth of the petition.

For lack of information as to the actual facts respondent denies the allegations contained in subparagraphs (g) and (h) of paragraph Fifth of the petition.

Denies the allegations contained in subparagraph (i) of paragraph Fifth of the petition.

Sixth. Denies generally and specifically each and every allegation contained in the petition, not hereinabove admitted, qualified or denied.

Wherefore, it is prayed that the appeal of the petitioners be denied.

(Signed) Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue.

Of Counsel: Leslie H. Rushbrook, John W. Smith, Special Attorneys, Bureau of Internal Revenue.

JWS/hco 9/10/37.

[fol. 16] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 90321. Promulgated July 13, 1939

HENRY W. TAFT and JULIA W. S. TAFT, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Held, where husband and wife file joint income tax returns, the wife's individual income and not the aggregate income shown in the return is the base to which the percentage formula provided in section 23 (o) of the Revenue Act of 1934 is applied in determining the deduction allowable on account of her charitable contributions. Art. 23 (o)-1, Regulations 86.

Clarence Castimore, Esq., for the petitioners.

Sidney U. Hiken, Esq., for the respondent.

OPINION

Hill: This proceeding is for the redetermination of income tax deficiencies for the years 1934 and 1935 in the respective amounts of $722.79 and $827.17. The issue is

whether or not respondent correctly computed deductions allowable on account of charitable contributions made by a wife from income shown in a joint income tax return filed for herself and husband.

The petitioners are husband and wife and when referred to individually in this opinion will sometimes be called "husband" and/or "wife." They reside in New York City, New York, and for each of the taxable years they filed a joint income tax return. Petitioners' return for 1934 showed an aggregate net income of $83,682.99, after a deduction of $2,852 was taken from gross income on account of contributions made by both petitioners during the year to charities. Of this sum deducted, $1,477 represented contributions made [fol. 17] by the wife and the balance represented gifts made by the husband during the year. The wife's net income, computed without reference to such contributions for the year and reported in the return, amounted to $12.10. The petitioners' return for 1935 reflected a joint net income of $92,374.59, after deducting $2,715.80 for charitable contributions made in the year. Of this latter sum $1,545.80 represented gifts made by the wife and the balance gifts by the husband in the year. The wife's net income in 1935, computed without reference to such contributions, amounted to the sum of $15.30. The wife's contributions to charities were made from gifts to her by the husband. During the years 1934 and 1935 and for many years prior thereto the husband had made gifts to the wife through bank checks and cash. Such gifts in 1934 and 1935 totaled more than $9,000 a year. Such checks and cash were in the main deposited by the wife in her own bank account and checked out by her for such purposes as she desired, including the charitable gifts in question. No conditions were attached to the gifts of the husband to the wife and no restrictions were imposed upon the use to which the wife might devote the proceeds thereof. They became her property absolutely to use as she pleased. The husband consulted with the wife at times respecting her gifts to charity, and at times made suggestions with reference thereto, but did not direct what gifts the wife should make or in any way control her actions in respect thereof. In respondent's audit of the returns for the taxable years, he adjusted the deduction claims in each by allowing only so much of the portion attributable to gifts of the wife as equaled 15 per cent of her individual net income computed without refer-

ence to such contributions for the related year. The net result of respondent's adjustments was to reduce the amount of deduction claimed for the wife's gifts in 1934 from $1,477 to $1.81, and the amount of deduction allowed for her gifts in 1935 from $1,545.80 to $2.30. The peti- [fol. 18] tioners charge that respondent committed error in such adjustments and contend that the aggregate net income shown in each return should have been used as the base for determining the deductions for charitable contributions in each year.

The issue is governed by section 23 (o) of the Revenue Act of 1934, which provides that in computing net income of individuals deductions shall be allowed for charitable and other contributions made during the taxable year to an amount which does not exceed 15 per cent of the taxpayer's net income as computed without benefit of the sub-section, and by section 51 (b) (2) of the act, which provides that where a husband and wife report their individual incomes in a single joint return the tax shall be computed on the aggregate income. The respondent's interpretation of these provisions is found in Treasury Regulations 86, which reads in part as follows:

Art. 23 (o)-1. Contributions or Gifts by Individuals.—

* * * * * * *

Whether a husband and wife make a joint return or separate returns, the 15 per cent limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts. (See article 51-1.)

Art. 51-1. Individual returns.— * * * if the income of each [spouse] is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income.

The petitioners contend that the respondent had no right to break down the aggregate incomes shown in their returns [fol. 19] and use the wife's individual net income in each as the base in applying the statutory percentage of 15 per cent to determine the allowable deduction with respect to her contributions to charities. Petitioners assign two reasons why under their theory this act of the respondent consti-

tuted error. Their first reason is based upon special facts which they seek to show the record sustains. They claim that in substance and for all practical purposes the gifts here in dispute were made by the wife for and in behalf of the husband and should be so treated in the returns. They point to the showing made in the record to the effect that, except for the nominal sums derived from dividends upon six shares of Continental Can Co. stock, the wife had no income or source of revenue, and that all of these gifts were made from a fund built up and accumulated from money supplied by the husband. Under such circumstances the petitioners argue the gifts should be considered as family gifts, in making which the wife acted as agent for the husband.

We do not think the record warrants the findings of fact petitioners urge in this first contention. It is true that substantially all of the gifts in question were made from money which the husband had from time to time given to the wife, and that her independent income was so insignificant as to justify our ignoring it as a feature. These circumstances, however, are without importance in view of the fact the funds when given belonged to the wife and were at all times her sole property and subject to her unrestricted use and control. This question as to the wife's clear title to the funds in question is so conclusively shown in the record as to leave no room for doubt or require argument to sustain. Nor did the husband contend otherwise when testifying on this phase of the case as a witness at the hearing, but frankly stated that he made all gifts to his wife without restrictions and for her sole use, benefit and control.

[fol. 20] The record shows that the husband and wife sometimes discussed with each other the question of gifts which each intended to make to charities, and the former stated in his testimony that for a number of years he had known of his wife's gifts and that "there may have been a case" where they discussed them in order to determine the amount he would "contribute directly in addition," but he could not recall "any particular one." Generally speaking, he said that the wife selected the beneficiaries for and amounts of her contributions without advice from him. The petitioners attach importance to the consultations between husband and wife referred to in the above statement and argue that it supports the theory that the former in this case exercised sufficient control over the gifts to make him

the principal and the wife his agent in their giving, but we do not think so. At most they show that the husband may have been influenced by the gifts made or to be made by the wife, but in no respect do they indicate that her gifts were controlled by him. Rather, we think, the explanations made by the husband on the witness stand negative the agency theory and support the respondent's side of the controversy on this point. On this question we overruled the contentions of the petitioners and hold that the gifts here involved were made by and in behalf of the wife from her individual funds.

Petitioners next argue that, in any event, the respondent erred in using the individual income of the wife as the percentage base for computing deductions attributable to her donations. On this issue they argue that the result of the filing of a joint income tax return by husband and wife under section 51 (b) (2), supra, is to create a taxing entity with a single income from and by which all deductions are made and determined. We do not agree with this contention. The spouses do not lose their identities as individual taxpayers by joining in a single income tax return. Pierce [fol. 21] v. Commissioner, 100 Fed. (2d) 397, and cases therein cited; Walter C. Janney, 39 B. T. A. 240.

Accordingly, the amount of the deduction in the joint return on account of the wife's contributions to charities must be determined on the basis of her individual net income and the application thereto of the statutory formula in section 23 (o), supra, as was done by the respondent herein.

The rule contended for by the petitioners would violate the formula fixed in the statute and substitute a new one not applicable to the income of the taxpayer who gave, but to his income increased by the income of another, a stranger to the gifts. It is obvious that such construction of the provision would pervert the object of the law and by the enlarged deduction resulting therefrom extend its benefits to one in no way connected with the gifts on which deductions are claimed. In our opinion such a construction is unauthorized. The regulation applied by the respondent prevents such a perversion of the act and protects all rights of both the Government and the taxpayer. It allows all deductions and credits to which either spouse to such a return would be entitled in making an individual return. In our opinion the respondent committed no error

in applying law to the facts at bar and we therefore sustain his action herein.

Decision will be entered for the respondent.

[fol. 22] BEFORE UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

Docket No. 90321

HENRY W. TAFT and JULIA W. S. TAFT, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated July 13, 1939, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1934 and 1935 in the respective amounts of $722.79 and $827.17.

Enter:

(s) Sam B. Hill, Member.

Entered July 17, 1939.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. Docket No. 90,321

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENT OF ERRORS

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Come now Henry W. Taft and Julia W. S. Taft by Henry W. Taft and Clarence Castimore, their counsel, and respectfully show:

I

That this is a proceeding for review by the United States Circuit Court of Appeals for the Second Circuit of a deci-

sion of the United States Board of Tax Appeals entered on July 17, 1939, determining that there was a deficiency in income tax of your petitioners for the years 1934 and 1935 in the respective amounts of $722.79 and $827.17.

II

Nature of the Controversy

The nature of the controversy is as follows: Petitioners, husband and wife, filed joint Federal income tax returns [fol. 24] for the calendar years 1934 and 1935. Petitioners' return for the year 1934 showed an aggregate net income of $83,682.99 after a deduction of $2,852 was taken from gross income on account of contributions to charities made during that year. Of this sum so deducted, $1,477 represented contributions made by the wife's check out of her separate bank account. The petitioners' return for the year 1935 reflected a joint net income of $92,374.59 after deducting $2,715.80 for charitable contributions made during the year, of which latter sum $1,545.80 represented contributions made by the wife's check out of her separate bank account. The wife's gross income for the year 1934 was $12.10 and for the year 1935 it was $15.30. The Commissioner of Internal Revenue limited the deduction allowable on account of the wife's charitable gifts to 15% of her gross income, that is, he allowed a deduction of $1.81 for the year 1934 and $2.30 for the year 1935.

The sole question involved is whether under the circumstances of this case, the Commissioner's action in limiting the deduction for charitable gifts made in the wife's name and out of her bank account to 15% of her net income is in accordance with the law.

III

Court Where Review Is Sought

The petitioners filed their income tax returns for the calendar years 1934 and 1935 with the Collector of Internal Revenue for the Second District in the United States Custom House in the City and State of New York, whose office is located within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit, and review of the decision of the United States Board of Tax Appeals is sought in this Circuit.

[fol. 25]

IV

Assignment of Errors

The petitioners assign as error the following acts and omissions of the United States Board of Tax Appeals.

1. The Board erred in finding and holding that the wife was not the agent of the husband or the means through which he made gifts to charity.

2. The Board erred in failing to find and hold that the wife was the agent of the husband or the means through which he made gifts to charity.

3. The Board erred in failing to find as a fact that for a period of nearly twenty years, including the taxable years 1934 and 1935, the husband had transferred funds to the wife with the knowledge and with his assent that a portion thereof, which had averaged about the same dur[illegible] all the years, would be devoted to charity.

4. The Board erred in finding and holding that Article 23 (o)-1 of Treasury Regulations 86 was, in whole or in part, a valid interpretation of Section 23 (o) of the Revenue Act of 1934.

5. In the alternative, the Board erred in holding and deciding that said regulation applied to the peculiar circumstances of this case.

6. The Board erred in holding and finding that the husband could not have taken as a charitable deduction the sums transferred to his wife and used by her for charity if husband and wife had filed separate returns.

7. The Board erred in failing to find and hold that the husband could have taken as a charitable deduction the [fol. 26] sums transferred to his wife and used by her for charitable purposes had he filed a separate return.

8. The Board erred in finding and deciding that the construction contended for by the taxpayer in this case would pervert the object of the statute and allow a stranger to the charitable gifts to get an unauthorized deduction therefor.

9. The Board erred in striking from the record certain testimony of the witness and in rejecting all testimony of the witness tending to show a consistent administrative interpretation of the Revenue Acts as applied to these tax-

payers for a period of years. The testimony so stricken and rejected was as follows:

(a) "Q. Well,——

A. I have known these were to be made, and I may say that at least since 1920 down to 1934, that never was any question made by the Treasury Department to these being properly made.

Mr. Hiken: I object to that and ask to have it stricken out.

The Member: Yes.

The Witness: Of course, I am not arguing this case, but I think that is very pertinent.

By Mr. Castimore:

Q. Well,——

A. What?

Q. Go ahead.

A. For the reason that——

Mr. Hiken: Excuse me. Just a minute. It has been objected to, and sustained.

The Member: That was objected to.

Mr. Hiken: I ask that it be stricken from the record.

The Member: It may be stricken from the record.

Mr. Castimore: Exception.

The Member: Exception allowed."

• • • • • • •

[fol. 27] (b) By Mr. Castimore:

"Q. Do you know whether these contributions have been set up during these years on the returns in the same form as they are in these last two years?

Mr. Hiken: I object to that, to what was done in the prior years.

The Member: I will sustain the objection.

Mr. Castimore: I would just like to note an exception.

The Member: Exception allowed.

Mr. Castimore: The reason for requesting this is that there is a regulation on the books which gives some color to this; secondly, that for years it was not occurred* and

* Obviously a mistake in reporting. This statement must have been "not disallowed."

it seems to us it must have been on one or two theories, namely that the regulation allowed it, or this theory and the one which we believe is the sound one, namely, that Mrs. Taft was the conduit or the agent of Mr. Taft and made these contributions from year to year. It is long standing, and they were not disallowed in prior years.

The Member: Whether it was allowed or disallowed does not affect the law in this case, and I will sustain the objection.

Mr. Castimore: The exception is already noted."

10. The Board erred in rejecting the offer of counsel for the taxpayer to place in evidence the returns of these taxpayers for past years. The ruling of the Board on this question was as follows:

"Mr. Castimore: May I say just one thing before we adjourn?

Mr. Taft is much concerned here. He is much concerned about wanting to have the prior returns placed in evidence, the joint returns, and I did not bring them with me.

[fol. 28] Mr. Hiken: I object to the offer.

The Member: I do not think they are relevant. The idea probably is that they were accepted by the Bureau and probably it might be some evidence, but what the Bureau thought does not bind the Board, and the Board will go ahead and determine what the law is regardless of what the Bureau did.

Mr. Castimore: Then I assume, your Honor, that if I did have them here, that they would be rejected?

The Member: An objection being made, I would have to sustain the objection.

Mr. Castimore: May I note an exception to a ruling of that sort?

The Member: Yes, you may have an exception."

11. The Board erred in holding and deciding that there were deficiencies in income tax for the calendar years 1934 and 1935 in the respective amounts of $722.79 and $827.17.

Wherefore, the petitioners being aggrieved by the aforesaid acts and omissions of the United States Board of Tax Appeals and by the opinion and decision entered pursuant thereto, petition that the decision of the said Board be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be pre-

pared in accordance with the law and with the rules of said Court and submitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: New York, N. Y., October 5th, 1939.

Henry W. Taft, Clarence Castimore, Attorneys for Petitioners; Cadwalader, Wickersham & Taft, 14 Wall Street, New York, N. Y.

[fol. 29] *Duly sworn to by Clarence Castimore. Jurat omitted in printing.*

[fol. 30] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. Docket No. 90,321.

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 11, 1939

To: Guy T. Helvering, Esq., Commissioner of Internal Revenue, Washington, D. C.

Please take notice that the petitioners on the 11th day of October, 1939, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Second Circuit of a decision of the Board heretofore rendered in the above entitled cause. A copy of the Petition for Review and Assignment of Errors, as filed, is hereby attached and served upon you.

Dated: New York, N. Y., October 5th, 1939.

Henry W. Taft, Clarence Castimore, Attorneys for Petitioners.

Personal service of the above and foregoing notice, together with a copy of the Petition for Review and Assign-

ment of Errors, mentioned therein, is hereby acknowledged this 11th day of October, 1939.

J. P. Wenchel, Attorney for Respondent on Review.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

[fol. 31] [File endorsement omitted]

Statement of Evidence—Filed Dec. 4, 1939

The above entitled cause came on for hearing before the Honorable Sam B. Hill, Member of the United States Board of Tax Appeals, at New York, New York, on the 9th day of January, 1939, pursuant to notice of hearing theretofore given. Hearing began at 4:50 o'clock P. M. and was concluded on the same day. There were present the petitioners by their counsel, Clarence Castimore, and the respondent by his counsel, Sidney U. Hiken.

The following is a statement of the evidence, so far as material to the assignment of errors herein, submitted to the Board of Tax Appeals at the hearing of this cause.

Mr. Castimore made the opening statement for the petitioners during the course of which counsel for the respective parties agreed upon the following stipulation:

STIPULATION

"Julia W. S. Taft made charitable contributions in 1934 and in 1935, which are listed on the schedule attached to the petitioners' joint return for those years as having been made by her. Such contributions were paid by checks which she drew against her individual bank account in the Fifth Avenue Branch of the Guaranty Trust Company of New York."

Counsel for the respondent thereupon made his opening statement.

[fol. 32] HENRY W. TAFT was then called as a witness on behalf of the petitioners and, having been first duly sworn, was examined and testified as follows:

Direct examination:

That he is one of the petitioners in the case; that the name of the other petitioner is Julia W. S. Taft and that she is his wife. That he knew that the only income producing property which Mrs. Taft owned was six shares of the stock of Continental Can Company and that he probably gave them to her many years ago.

He then proceeded to testify as to transfers of funds to Mrs. Taft by means of checks drawn to her order, which checks totaled $8,820 for the year 1934 and $9,850 for the year 1935, and were admitted in evidence as Petitioner's Exhibits 2 and 3; also as to incidental transfers of cash to Mrs. Taft, all of which testimony was offered for the purpose of showing that Mr. Taft was the source of all of the funds in the bank account out of which Mrs. Taft made her contributions except the sum of $12.10 in the year 1934 and $15.30 in the year 1935 which was admitted in the pleadings to have been dividends from the six shares of Continental Can Company stock received and deposited in this account during the years 1934 and 1935.

The course of this testimony was interrupted and concluded when counsel for the respective parties to the action agreed in open court upon the following stipulation:

"Mr. Hiken: It is stipulated, so far as the respondent is concerned, that the charitable contributions that were paid by Mrs. Taft for the years 1934 and 1935 were paid out of her personal bank account and that her bank account consisted of deposits which she made of checks payable to her order, drawn by Mr. Taft and given to her by way of [fol. 33] gifts and other cash items that were given to Mrs. Taft by Mr. Taft and likewise deposited by her in her personal bank account. Is that satisfactory?

Mr. Castimore: That is satisfactory."

The witness resuming:

The witness was then shown a list, attached to the joint return, of the charities to which he contributed personally and the contributions over which this controversy arose and he was asked to look at the list carefully and state whether he was familiar with some of the contributions and the organizations, to which he replied:

"Yes, all of them—I see most of them."

He was then asked whether he ever discussed the matter of charitable gifts with Mrs. Taft, to which he replied:

"I might state in a general way that for many years with my knowledge, she has made numerous charitable gifts to charitable religious organizations for religious purposes, and I have known about that and have known when I paid her, and these amounts I have applied to that purpose and each year I have procured from her a complete list of these contributions.

This goes back—well let us say, twenty years, and I have taken them to my office and enumerated these gifts and had them inserted in my income tax returns. I have known about them from year to year."

Whereupon the following interchange ensued:

"Q. Well——

"A. I have known these were to be made, and I may say that at least since 1920 down to 1934, that never was any question made by the Treasury Department to these being properly made.

[fol. 34] "Mr. Hiken: I object to that and ask to have it stricken out.

"The Member: Yes.

"The Witness: Of course, I am not arguing this case, but I think that is very pertinent.

"By Mr. Castimore:

"Q. Well——

"A. What?

"Q. Go ahead.

"A. For the reason that——

"Mr. Hiken: Excuse me. Just a minute. It has been objected to, and sustained.

"The Member: That was objected to.

"Mr. Hiken: I ask that it be stricken from the record.

"The Member: It may be stricken from the record.

"Mr. Castimore: Exception.

"The Member: Exception allowed."

The witness was then asked again whether he ever discussed these charitable contributions with Mrs. Taft, to which he replied in the affirmative about some of them, but not all of them.

"I can't say all of them, but I knew some of these were from year to year, but * St. Patrick's Cathedral and the Church at White Sulphur Springs, where we go in the summertime, but I didn't have the exact amount, but I knew about the contributions at the end of the year when I got them in order to insert them in my return."

The witness was then asked if he knew what the bank account was used for other than the contributions, to which he replied that sometime she would purchase some article personally, a dress, sometimes a coat, and that the payments that were made to her were not for household ex- [fol. 35] penses as he paid those in addition, and that by the household expenses he meant servants' wages and supplies and things like that. When asked whether the transfers to his wife would ordinarily be called pin money, he replied that allowances to his wife for pin money never was a practice in his family; that he always paid all of the household expenses and that the amount transferred to her was to give her some money to pay for things she wanted, and at times she applied it to the payment of her clothing.

In response to the question whether the knowledge that the contributions were being made from these funds had any effect on the amount of the allowance or transfers to Mrs. Taft, he replied that it was never suggested that he pay her more or less and that the sum which he paid her was for general purposes that she applied part of it to her clothing, but only in part. He assumed for some years the payment of that.

The witness then repeated that he was perfectly well aware that the funds that were transferred to Mrs. Taft were used for charitable purposes; that he had been consulted about them from time to time, not in detail but generally, and that he didn't charge his mind with each particular contribution but knew this from what he learned during the course of ten or twelve years prior to 1934 and that the aggregate amount was about what it was during these two years.

The following then ensued:

"By Mr. Castimore:

"Q. Do you know how long you filed joint returns?
A. What?

* Probably the word was "to".

"Q. Do you know how long you filed joint returns?

"Mr. Hiken: Just a minute. I object to that as immaterial.

[fol. 36] "The Member: I do not see the materiality of it, but I will let it in.

"The Witness: I know that they went back as far as 1920.

"By Mr. Castimore:

"Q. Do you know whether these contributions that have been set up during these years on the returns in the same form as they are in these last two years?

"Mr. Hiken: I object to that, to what was done in the prior years.

"The Member: I will sustain the objection.

"Mr. Castimore: I would just like to note an exception.

"The Member: Exception allowed.

"Mr. Castimore: The reason for requesting this is that there is a regulation on the books which gives some color to this; secondly, that for years it was not occurred * and it seems to us it must have been on one or two theories, namely that the regulation allowed it, or this theory and the one which we believe is the sound one, namely, that Mrs. Taft was the conduit or the agent of Mr. Taft and made these contributions from year to year. It is long standing, and they were not disallowed in prior years.

"The Member: Whether it was allowed or disallowed does not affect the law in this case, and I will sustain the objection.

"Mr. Castimore: The exception is already noted.

"You may cross examine."

[fol. 37] Cross-examination:

Counsel for the respondent then asked the witness whether he imposed any restrictions on how she disposed of the proceeds of the checks turned over to her, to which he replied: "Absolutely not." He was then asked whether the same was true with respect to the cash that was given to her and the reply was the same. In response to the

* Obviously a mistake in reporting. This statement must have been "not disallowed."

question as to whether he selected the donees of the charitable contributions, the witness replied:

"I would not care to answer that question without qualifications. There may have been instances where I did make a suggestion or something of that kind. There probably were, but generally speaking, I would say no."

In response to the question as to whether, generally speaking, she selected the beneficiary and determined the amount, he replied that that was so but

"There may have been a case, for instance, where we conferred as to the amount I was going to contribute and I would ask about it in order to determine the amount that I contribute directly in addition. There may have been such an instance as that. I can't recall any particular one."

Counsel for the respondent then offered in evidence petitioners' income tax return for the year 1934 with schedules attached. The return was received in evidence and marked Respondent's Exhibit "A". Counsel for respondent then offered in evidence petitioners' income tax return for the year 1935, to which were attached the schedules of contributions and it was admitted in evidence and marked Respondent's Exhibit "B".

The witness was thereupon excused.

[fol. 38] After some discussion by counsel about the time for filing briefs, the following ensued:

"Mr. Castimore: May I say just one thing before we adjourn?

"Mr. Taft is much concerned here. He is much concerned about wanting to have the prior returns placed in evidence, the joint returns, and I did not bring them with me.

"Mr. Hiken: I object to the offer.

"The Member: I do not think they are relevant. The idea probably is that they were accepted by the Bureau and probably it might be some evidence, but what the Bureau thought does not bind the Board, and the Board will go ahead and determine what the law is regardless of what the Bureau did.

"Mr. Castimore: Then I assume, your Honor, that if I did have them here, that they would be rejected?

"The Member: An objection being made, I would have to sustain the objection.

"Mr. Castimore: May I note an exception to a ruling of that sort?

"The Member: Yes, you may have an exception.

"Mr. Castimore: Of course, we have not really offered them.

"The Member: Yes, I understand."

Whereupon the hearing was concluded.

November 17, 1939.

Henry W. Taft, Clarence Castimore, Counsel for Petitioners.

[fols. 39-40] Petitioners tender and present the foregoing as a true and complete statement of the evidence submitted to the Board of Tax Appeals which is material to the errors assigned in the petition for review herein. Petitioners pray that the same may be settled and approved by the Board and made a part of the record in this case.

Henry W. Taft, Clarence Castimore, Counsel for Petitioners.

The foregoing is a true and complete statement of the evidence submitted to the Board of Tax Appeals which is material to the errors assigned in the petition for review, and the same is approved by the undersigned as attorney for the respondent on review.

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

The foregoing statement of evidence is settled and approved and made a part of the record herein this — day of November, 1939.

—— ——, Member, United States Board of Tax Appeals.

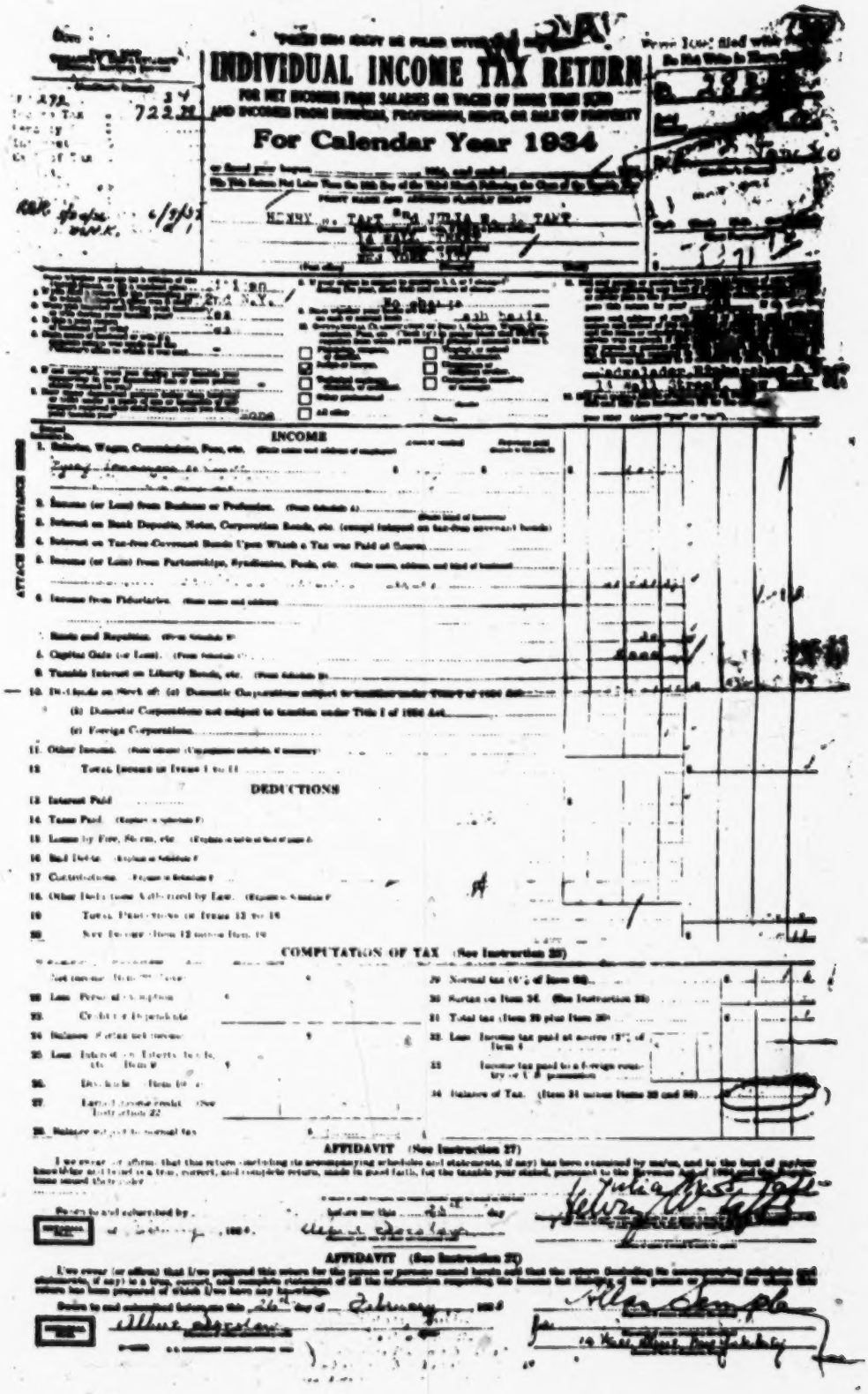
ORDER APPROVING STATEMENT OF EVIDENCE

Approved and ordered filed this 4th day of Dec., 1939.

(s) Sam B. Hill, Member.

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RESPONDENT'S EXHIBIT A



INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $3000 AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1934

INCOME

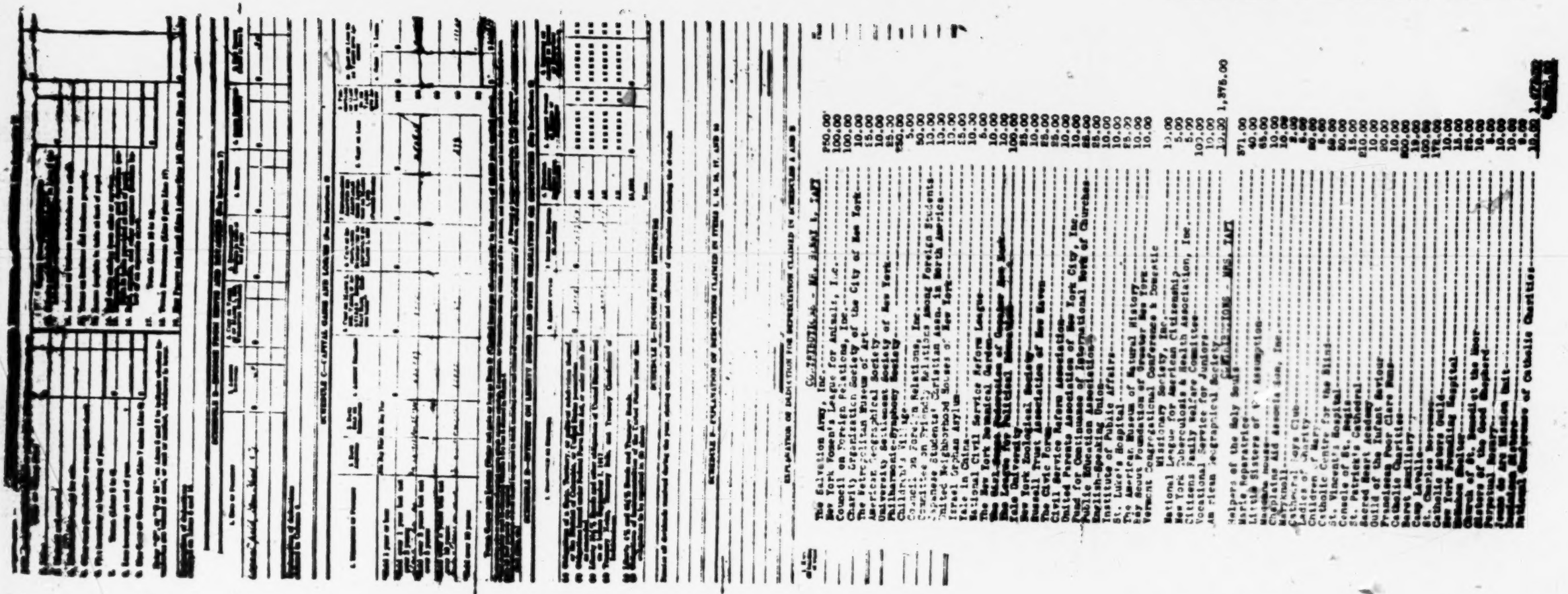
DEDUCTIONS

COMPUTATION OF TAX (See Instruction 22)

AFFIDAVIT (See Instruction 27)

AFFIDAVIT (See Instruction 22)

RESPONDENT'S EXHIBIT A Cont'd.



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RESPONDENT'S EXHIBIT B 31

INDIVIDUAL INCOME TAX RETURN

For Calendar Year 1936

MAR 14 1936

INCOME

DEDUCTIONS

COMPUTATION OF TAX (See Instruction 23)

AFFIDAVIT (See Instructions 27)

AFFIDAVIT (See Instruction 27)

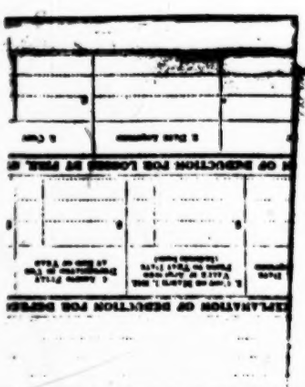
RESPONDENT'S EXHIBIT B Cont'd.

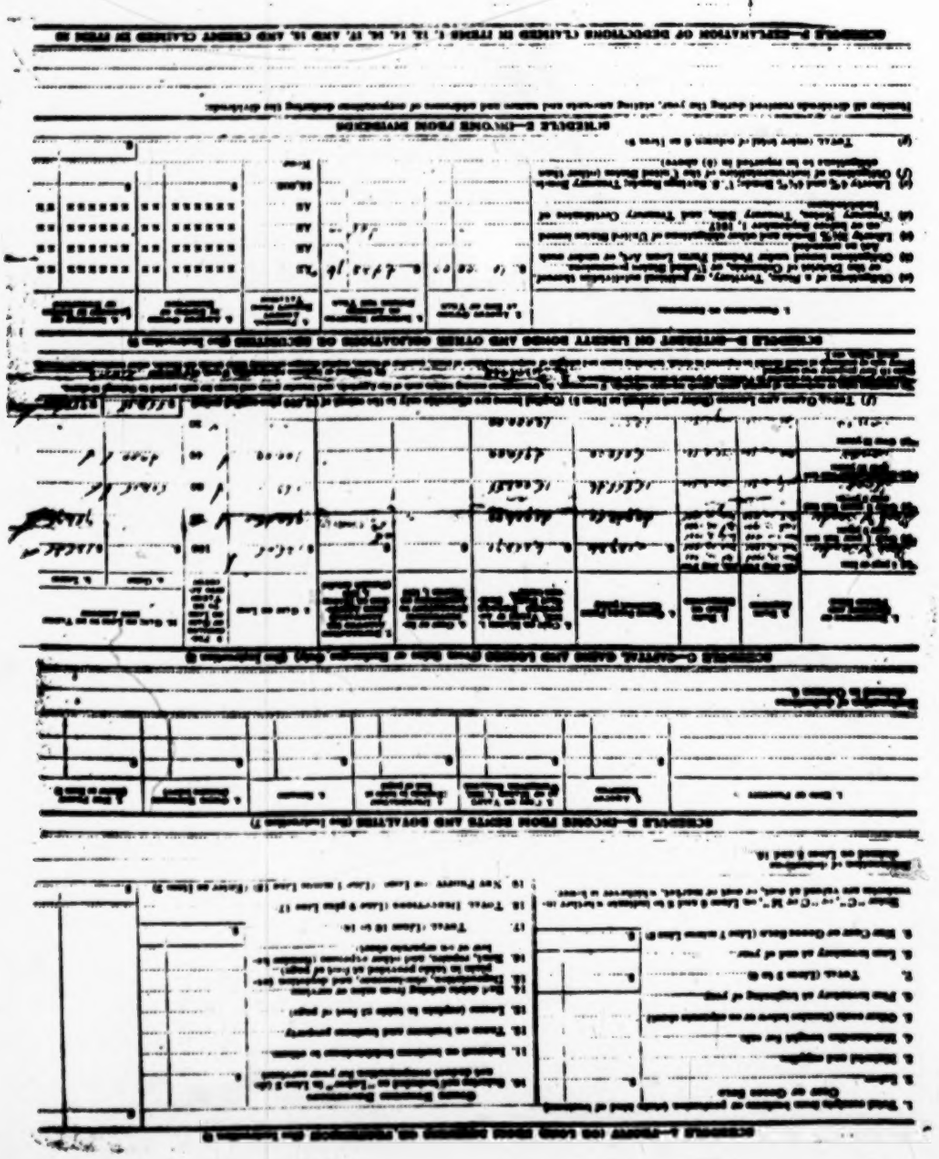
The Metropolitan Museum of Art	$25.00
University Settlement Society of New York	25.00
Charity Organization Society	10.00
Public Education Association	10.00
National Economic League	10.00
Council on Foreign Relations, Inc.	50.00
Society for Japanese Studies	50.00
The Philharmonic-Symphony Society of New York	250.00
National Civil Service Reform League	5.00
The Civic Forum	5.00
National Committee on Prisons and Prison Labor	10.00
The New York Botanical Garden	10.00
National Trust Association	25.00
Council on Foreign Relations, Inc.	100.00
Friendly Relations among Foreign Students	10.00
The Salvation Army	100.00
New York Women's League for Animals, Inc.	25.00
Institute of Public Affairs	10.00
Boy Scout Foundation of Greater New York	10.00
New York Zoological Society	10.00
Public Education Association	10.00
The Museum of the City of New York	10.00
The National Conference of Jews and Christians	10.00
The League for Political Education	100.00
National Civil Service Reform League	5.00
National Kindergarten Association	5.00
The American Christian Committee for Germany	
Refugees	10.00
National Defense Committee	5.00
New York Tuberculosis & Health Association, Inc.	5.00
The Philharmonic-Symphony Society of New York	10.00
The Childrens Aid Society	10.00
The United Hospital Campaign Committee	100.00
Greenwich House	10.00
Vocational Service for Juniors	10.00
University Settlement Society of New York	25.00
	$1,170.00

JOHN HENRY A. TAFT

St. Patricks Cathedral	$250.00
Catholic Young Woman's Club	5.00
National Conference of Catholic Charities	10.00
Sisters of Christian Doctrine	60.00
Little Sisters of the Assumption	50.00
Camp Loyolla	50.00
St. Charles Church, White Sulphur Springs, W. Virginia	100.00
Ladies of Charity	15.00
Needlework Guild of America	10.00
Catholic Actors Guild of America	10.00
Tabernacle Society of the Sacred Heart Convent	5.00
Dominican Sisters of the Sick Poor	4.00
Cathedral Boys Club	5.00
Catholic Center for the Blind	144.60
Marie Reparatrice	25.00
Society of the Children of Mary	5.00
Mckinon Shelter	20.00
Helpers of the Holy Lords	40.00
St. Vincents Hospital	5.00
Dominican Sisters of the Perpetual Rosary	5.00
Franciscan Poor Clare Nuns	5.00
Auxiliary New York Foundling Hospital	15.00
Guild of the Infant Saviour	25.00
Berne Settlement	4.00
Madonna House	5.00
Mary Knoll Fathers	7.00
Chaplains Aid Association	10.00

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RESPONDENT'S EXHIBIT B Cont'd.

Item 14 -	Real Estate Taxes, Glen Head, N.Y. Property	$ 949.25
	1934 New York State Income Tax	4,851.87
	Automobile registration	55.25
	Stock transfer stamps	24.00
	Check tax	2.62
	Duty on wine shipment	3.50
	Dues paid on club dues	93.75
	" " " safe rent	2.00
	West Virginia State Tax	85.31
	New York City Sales Tax	177.78
		$6,246.28

Item 15 -	Dues to professional Societies	$ 139.50
	Salary of Secretary	1,213.33
	Collection charges on coupons	1.50
	Subscription to legal publication	40.00
	Safe Rent	20.00
		$1,414.33

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BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

[fol. 44] [File endorsement omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 2, 1939

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals, Second Circuit, with reference to petition for review heretofore filed by the petitioners in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The Docket entries of all proceedings before the United States Board of Tax Appeals.

2. Pleadings before the United States Board of Tax Appeals as follows:

(a) Petition for redetermination including the deficiency letter attached thereto.

(b) Answer of the Respondent.

3. The findings of fact and opinion of the United States Board of Tax Appeals.

[fol. 45] 4. The decision of the United States Board of Tax Appeals.

5. The notice of filing and petition for review and assignment of errors filed by the petitioners in the above cause.

6. The statement of evidence as approved and settled by the United States Board of Tax Appeals together with Respondent's Exhibits A and B.

7. All orders of enlargement, if any.

8. This praecipe together with proof of service of a copy thereof.

Clarence Castimore, Henry W. Taft, Attorneys for Petitioners, 14 Wall Street, New York City.

Service of a copy of the foregoing praecipe is hereby acknowledged this 2nd day of December, 1939, and the same is agreed to on behalf of the Respondent.

J. P. Wenchel, Attorney for Respondent.

[fol. 46] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1939

No. 234

(Argued April 9, 1940. Decided April 22, 1940)

HENRY W. TAFT and JULIA W. S. TAFT, Petitioners,

against

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

On petition to review an order of the Board of Tax Appeals fixing an assessment upon the petitioners' income taxes for the years 1934 and 1935.

Before: L. Hand, Augustus N. Hand and Patterson, Circuit Judges

Clarence Castimore for the petitioners.
Robert N. Anderson for the respondent.

Per CURIAM:

Order affirmed upon the authority of Pierce v. Helvering, 100 F. (2d) 397 (C. C. A. 2).

[fol. 48] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of May one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Robert P. Patterson, Circuit Judges.

HENRY W. TAFT and JULIA W. S. TAFT, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 49] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry W. Taft and Julia S. S. Taft, v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 8, 1940. D. E. Roberts, Clerk.

[fol. 50] UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry W. Taft and Julia W. S. Taft, Petitioners, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fifteenth day of June, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk. (Seal.)

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the second question presented by the petition. The case is assigned for argument immediately following No. 113.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Clarence Castimore. File No. 44532. U. S. Circuit Court of Appeals, Second Circuit. Term No. 183. Henry W. Taft and Julia W. S. Taft, Petitioners, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed June 26, 1940. Term No. 183 O. T. 1940.

(344)

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FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 26 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 183

HENRY W. TAFT and JULIA W. S. TAFT,
Petitioners,

AGAINST

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to Review a Decision of the United States Circuit Court of Appeals, Second Circuit, and Supporting Brief.

CADWALADER, WICKERSHAM & TAFT,
Attorneys for Petitioners,
Office & P. O. Address,
No. 14 Wall Street,
New York, N. Y.

HENRY W. TAFT,
CLARENCE CASTLE MORE,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

HENRY W. TAFT and JULIA W. S. TAFT,
Petitioners,

AGAINST

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition of Henry W. Taft and Julia W. S. Taft for Writ of Certiorari to Review a Decision of the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Henry W. Taft and Julia W. S. Taft, respectfully show to the Court as follows:

Opinions Below.

The opinion of the Board of Tax Appeals is reported in 40 B. T. A. 229 and is produced in full in the record at pages 16-21. The United States Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals without opinion on the authority of *Pierce* v. *Helvering*, 100 Fed.

(2d) 397 (C. C. A., 2nd). Decision was handed down on April 22, 1940.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

Questions Presented.

1. Whether husband and wife who file a joint income tax return are a single taxpayer or are two separate and distinct taxpayers.

2. Whether the limitation on the deduction for contributions to charities to 15% of the taxpayer's net income must be computed with reference to the husband's and wife's separate net income where a joint return is filed, or whether it may be computed on their combined net income.

3. Whether the Board of Tax Appeals erroneously barred certain evidence from the record.

4. In the alternative, whether under the peculiar circumstances of this case, the husband was, in fact and in substance, the donor of these gifts and hence the "taxpayer" within the meaning of the statute.

Statutes Involved.

Revenue Act of 1934 (48 Stat. 680):

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(c) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary."

"SEC. 51. INDIVIDUAL RETURNS.

* * * * * *

(b) Husband and Wife.—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

Statement of the Case.

The facts, as stipulated, Record, pages 31 and 32, and as found by the Board, Record, pages 16-21, are briefly as follows:

Petitioners are husband and wife living together and reside in the City of New York. They filed joint income tax returns for the calendar years 1934 and 1935. The return for the year 1934 showed an aggregate net income of $83,682.99, after a deduction of $2,852 was taken from gross income on account of contributions made by both petitioners during the year to charities. Of this latter sum, $1,477 represented contributions made by the wife. The wife's net income, computed without reference to such contributions for the year and reported in the return, amounted to $12.10. The return for 1935 reflected an aggregate net income of $92,374.59, after deducting $2,715.80 for charitable contributions made in the year. Of this latter sum, $1,545.80 represented contributions made by the wife. The wife's net income in 1935, computed without reference to such contributions, amounted to $15.30. During the years 1934 and 1935, and for many years prior thereto, the husband had transferred funds to the wife by means of bank checks and cash. Such gifts in 1934 and 1935 totalled more than $9,000 a year. Such checks and cash were in the main deposited by the wife in her own bank account and checked out by her for such purposes as she desired, including the charitable gifts in question. No conditions were attached to the gifts of the husband to the wife and no restrictions were imposed upon the use to which the wife might devote the proceeds thereof. The husband consulted with the wife at times respecting her gifts to charity, and at times made suggestions with reference thereto, but did not direct what gifts the wife should make or control her actions with respect thereto. Except for the nominal income listed above which was derived

from dividends on six shares of Continental Can Company stock, the wife had no income or source of revenue and all of the gifts by the wife were made from a fund built up and accumulated from money supplied by the husband. The husband testified that for a number of years he had known about his wife's charitable gifts and that each year he had procured from her a complete list of them (Rec., p. 33).

In auditing the returns, the Commissioner reduced the amount of deduction claimed for the wife's gifts in 1934 from $1,477 to $1.81, and the amount of deduction claimed for gifts in 1935 $1,545.80 to $2.30. This result was reached by limiting the deduction to 15% of the wife's separate net income, to wit, 15% of $12.10 for the year 1934, and 15% of $15.30 for the year 1935.

The Board of Tax Appeals sustained the Commissioner's determination. The taxpayers appealed to the United States Circuit Court of Appeals. The errors assigned and argued are set forth in detail at pages 25 and 26 of the record. The Circuit Court of Appeals affirmed the decision of the Board without opinion on authority of *Pierce* v. *Commissioner*, 100 Fed. (2d) 397, which case holds that a husband and wife filing a joint return are separate taxpayers and that the excess of capital losses of the one may not be deducted from the capital gains of the other. The decision of the Circuit Court of Appeals made no mention of the argument of the petitioners that the husband was the real donor of the charities in this case or of the argument that the Board had abused its discretion in barring certain testimony from the record.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that a husband and wife filing a joint return are separate taxpayers and that the separate statutory

net income of each must first be computed in arriving at the aggregate income which is subject to the tax.

2. The Circuit Court of Appeals erred in failing to hold and decide that husband and wife filing a joint return are a single taxpayer or taxable unit and that the aggregate income to be taxed is the combined gross income of both less the combined deductions of both.

3. The Circuit Court of Appeals erred in holding and deciding that the allowable charitable deduction of the wife is limited to 15% of the wife's separate net income.

4. The Circuit Court of Appeals erred in failing to hold and decide that the allowable charitable deduction of the wife is limited only by the combined net income shown on the joint return.

5. The Circuit Court of Appeals erred in holding and deciding that the husband was not the donor of these charitable contributions.

6. The Circuit Court of Appeals erred in failing to hold and decide that the husband was the donor of these gifts.

7. The Circuit Court of Appeals erred in sustaining the ruling of the Board that certain evidence should be barred from the record as immaterial.

8. The Circuit Court of Appeals erred in failing to hold and decide that the Board abused its discretion in barring from the record certain testimony.

Reasons Why Writ Should Be Granted.

1. The decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of the Third Circuit in *Janney* v. *Commissioner,* 108 Fed. (2d) 562.

2. The apparent conflict between Article 51-1 of Regulations 86 issued under the Revenue Act of 1934 and Article 23(o)-1 of the same Regulations should be passed upon by this Court in the interest of uniform administration of the Revenue Acts.

3. This Court should pass upon the question as to whether the Board erred in barring certain testimony from the record.

4. The argument of the taxpayers in the Court below that the husband in this case was, in fact and in substance, the donor of these charitable gifts should be passed upon by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court on a day designated for its review and determination a full and complete transcript of the record and full proceedings in said Circuit Court of Appeals had in the case numbered 234 and entitled *"Henry W. Taft and Julia W. S. Taft, Petitioners* v. *Commissioner of Internal Revenue, Respondent"*; to the end that said cause may be reviewed and determined by this Court as provided by law, that the determination of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed,

and that your petitioners may have such other and further relief as may be just.

Dated: New York, N. Y., June 19, 1940.

HENRY W. TAFT,
JULIA W. S. TAFT,
Petitioners.

CADWALADER, WICKERSHAM & TAFT,
Attorneys for Petitioners,
Office & P. O. Address,
14 Wall Street,
New York, N. Y.

HENRY W. TAFT,
CLARENCE CASTIMORE,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

CLARENCE CASTIMORE, being duly sworn according to law, deposes and says that he is one of the attorneys for the petitioners; that he prepared the foregoing petition and that the facts therein stated are true to the best of his information and belief.

CLARENCE CASTIMORE.

Subscribed and sworn to before me this 19th day of June, 1940.

ALBERT SOCOLOW,
Notary Public,
Bronx County No. 209,
Bronx County Register's No. 153 S 41;
Certificate filed in New York County No. 761;
New York County Register's No. 1 S 510;
Appointment expires March 30, 1941.
(Notarial Seal)

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

POINT I.

The decision below is in substantial conflict with *Janney* v. *Commissioner*, 108 Fed. (2d) 564 (C. C. A., 3rd) certiorari granted April 29, 1940.

The Board of Tax Appeals in deciding this case stated as follows:

> "The spouses do not lose their identities as individual taxpayers by joining in a single income tax return. *Pierce* v. *Commissioner*, 100 Fed. (2d) 397, and cases therein cited; *Walter C. Janney*, 39 B. T. A. 240.
>
> Accordingly, the amount of the deduction in the joint return on account of the wife's contributions to charities must be determined on the basis of her individual net income and the application thereto of the statutory formula in section 23(o), *supra*, as was done by the respondent herein" (Rec., pp. 20-21).

The Circuit Court of Appeals affirmed on the authority of *Pierce* v. *Commissioner*, 100 Fed. (2d) 397, which holds that husband and wife filing a joint return are separate taxpayers and the capital loss of the one may not be offset against the capital gain of the other.

The *Janney* case, referred to in the Board's statement above, was later reversed. *Janney* v. *Commissioner*, 108 Fed. (2d) 564 (C. C. A., 3rd). Therein the court stated:

> "The Government suggests that husband and wife cannot be regarded as a joint entity—have not been by the cases construing tax statutes. But that seems to us unconvincing in considering whether a statute authorizing a single return for both does not also contemplate a consolidation of the losses and gains of both, a more rational and more direct construction of a statute evidently intended by Congress to be in favor of the taxpayer. Since the statute provides that in the case of a joint return 'the tax shall be computed on the aggregate income' it logically and indeed necessarily follows, in the absence of an express statutory provision to the contrary, that in arriving at joint net income both gross income and deductions of the spouses must be aggregated and treated as the income and deductions of a single taxpayer."

The conflict between the *Janney* case and the *Pierce* case, on the authority of which the instant case was decided, is fundamental and irreconcilable and depends upon directly opposing views of the underlying theory of joint returns. (See Yale Law Review, May, 1940, pages 1280, *et seq.*) The *Janney* case is also in conflict with *Demuth* v. *Commissioner*, 100 Fed. (2d) 1012 (C. C. A., 2d). Certiorari denied 307 U. S. 627; *Nelson* v. *Commissioner*, 104 Fed (2d) 521 (C. C. A., 4th); *Sweet* v. *Commissioner*, 102 Fed. (2d) 103 (C. C. A., 1st). Certiorari denied 307 U. S. 627; and *Gaines* v. *Commissioner* (C. C. A., 2nd) April 22, 1940. Certiorari was granted on April 29, 1940 in the *Janney* case because of this conflict. In agreement with *Janney* v. *Commissioner, supra*, on the intent of Congress with respect to joint returns is *Commissioner* v. *Thomas*, 84 Fed. (2d) 562 (C. C. A., 5th) where the court stated:

"As applied to this case, the plain, common sense meaning of the provision 'the tax shall be computed on the aggregate income' is that the income of the spouses is to be added together and losses sustained by either or both of them are to be deducted from that aggregate in determining the net taxable income."

While the above cases involve different deductions than the one in controversy in the present case, the principle upon which the right to the deduction rests is identical. Therefore, the same reason exists for granting the writ in this case as existed in the *Janney* case, i. e., an irreconcilable conflict in the Circuits on the force and effect of a joint return.

POINT II.

There is an apparent conflict between Article 51-1 of Regulations 86 and Article 23(o) of Regulations 86, issued under the Revenue Act of 1934.

Article 51-1 of Regulations 86, issued under the Revenue Act of 1934 provides, with respect to husband and wife, as follows:

"If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income."

That this regulation is ambiguous is evident from the fact that the Second Circuit in *Pierce* v. *Commissioner, supra,* and the Third Circuit in *Janney* v. *Commissioner, supra,* cannot agree as to its meaning and effect.

Article 23(o)-1 of Regulations 86 provides with respect to contributions, as follows:

> "Whether a husband and wife make a joint return or separate returns, the 15 per cent. limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts."

If the decision of the Third Circuit in the *Janney* case is correct, it is obvious that the last quoted regulation is in conflict with the provisions of Article 51-1 quoted above. The same provisions are in the present Regulations 103 (Sec. 19.51-1 and Sec. 19.23[o]-1). It is a matter of general public concern that this apparent conflict be resolved so that there may be a consistent and uniform administrative application of the statute.

POINT III.

The Board abused its discretion in barring certain testimony from the record.

As has been indicated above, the portion of Article 51-1 quoted above is clearly ambiguous. At the same time that this regulation was outstanding, there were other published rulings also outstanding which were clearly in conflict with the interpretation which the Commissioner now places upon Article 51-1. (See Sol. Op. 90, 4 C. B. 236; I. T. 1997, III-1 C. B. 149; and CCH 1933, Vol. III, Par. 6037, all of which treat husband and wife filing jont returns as a single taxable entity.) In order to aid the Board in its interpretation of the regulation and the statute, the petitioners offered at the trial certain evidence tending to show the actual practice of the Commissioner's

agents in auditing returns while the aforesaid ambiguous regulation was on the books. All of this evidence was either stricken from the record (Rec., pp. 34, 36 and 38) or barred completely as immaterial. We submit that the actual practice of the Commissioner's agents in applying a regulation to specific cases especially where the regulation is susceptible of two or more meanings and is seemingly in conflict with another regulation, is just as important an aid to the practical interpretation of the regulation and the statute under which it was issued as are published rulings, and that the evidence offered was material and the Board abused its discretion in barring it.

POINT IV.

Even if it be determined in the *Janney* case that husband and wife filing a joint return are not a single taxable entity, still under the peculiar circumstances of this case, the deduction should be allowed.

The Board of Tax Appeals held that since the husband had transferred the funds to the wife without placing any specific restriction on them, they must be regarded as her property and free from any family direction or control and the limitations of contributions to charity made out of this fund must be computed upon her separate income.

The evidence is undisputed that all of the funds out of which the wife made these contributions with the exception of the minor amount mentioned in the statement of facts, came directly from the husband who had made a practice for years of turning over funds to her (Rec., pp. 32-33). He discussed some of the charitable gifts with her; he had known for years that a portion of these funds would be used for charities; each year he procured a list of the charities from her; and he continued to acquiesce

in her use of a portion of the funds in that manner (Rec., p. 33). It was argued below that under these circumstances, the wife was merely the agent of the husband or the conduit through which his income flowed to charitable uses and that the real substance of the matter was that he was the donor and the taxpayer within the intent of Section 23(o) of the statute, and, therefore, he was entitled to the deduction. The Circuit Court of Appeals apparently did not consider this argument. It is contended that this argument has merit and it should be carefully reconsidered.

Conclusion.

Because of the fundamental conflict between this case and the *Janney* case and for the other reasons stated above, it is submitted that the petition for writ of certiorari should be granted.

Dated: New York, N. Y., June 19, 1940.

Respectfully submitted,

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HENRY W. TAFT,
CLARENCE CASTIMORE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 183.

HENRY W. TAFT and JULIA W. S. TAFT,
Petitioners,

AGAINST

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Board of Tax Appeals is reported in 40 B. T. A. 229 and is produced in full in the record at pages 10-15. The decision of the United States Circuit Court of Appeals, Second Circuit, is reported in 111 Fed. (2d) 145 and on page 47 of the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347). Certiorari was granted by this Court on October 14, 1940.

Statement of the Case.

Petitioners are husband and wife living together and they reside in the City of New York. They filed joint

income tax returns for the calendar years 1934 and 1935. The return for the year 1934 showed an aggregate net income of $83,682.99. In arriving at this net income, a deduction of $2,852 was taken on the return for gifts to charity. Of this latter sum, $1,477 represented contributions paid by the wife out of her individual bank account. Her total gross income for the year was $12.10. The return for the year 1935 showed an aggregate net income of $92,374.59. In arriving at this net income, a deduction of $2,715.80 was taken on the return for gifts to charity. Of this sum, $1,545.80 represented gifts paid by the wife out of her individual bank account. The wife's total gross income for the year 1935 was $15.30 (Rec. p. 11). All funds in her bank accounts were funds furnished by the husband except the sums of $12.10 and $15.30 mentioned above (Rec. p. 22). Upon audit of the return, the Commissioner ruled that the aforesaid deductions for charity made by the wife must be reduced to 15% of her net income. Thus, he allowed a deduction of $1.81 only for the year 1934 and $2.30 only for the year 1935 on account of the wife's charitable gifts (Rec. p. 12). The net result of this was a disallowance of $2,918.69 of the deduction taken for charities on the two returns and the resulting deficiency against the petitioners of $722.79 for the year 1934 and $827.17 for the year 1935 (Rec. pp. 6, 7, 8, 9). The petitioners appealed to the United States Board of Tax Appeals and to the United States Circuit Court of Appeals, Second Circuit, and the case comes before this Court on writ of certiorari granted on October 14, 1940.

Specification of Errors to Be Urged.

The order granting the writ limits the petitioners to the second question presented by the petition for the writ which was stated as follows:

> "Whether the limitation on the deduction for contributions to charities to 15% of the taxpayer's

net income must be computed with reference to the husband's and wife's separate net income where a joint return is filed, or whether it may be computed on their combined net income."

Statute Involved.

Revenue Act of 1934 (48 Stat. 680):

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(o) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) a corporation, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;

* * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allow-

able as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary."

"SEC. 51. INDIVIDUAL RETURNS.

* * * * * * *

(b) Husband and Wife.—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over——

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

ARGUMENT.

The provisions of the various income tax statutes providing that husband and wife might file a joint return were intended by Congress to grant to husband and wife the privilege of pooling their income and deductions thus arriving at the combined aggregate net income.

The Revenue Act of 1918 was the first Income Tax Act to provide for the filing of joint income tax returns of husband and wife. Section 223 thereof (40 Stat. 1074) provided:

"That every individual having a net income for the taxable year of $1,000 or over if single * * *, or of $2,000 or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this title. If a

husband and wife living together have an aggregate net income of $2,000 or over, each shall make such a return unless the income of each is included in a single joint return."

The statute did not provide that the tax on such a return should be computed on the aggregate net income. In Sol. Op. 90 (4 C. B., p. 236), published early in 1921, the Solicitor of Internal Revenue ruled that under that Act, the tax on a husband and wife filing a joint return was to be computed on the aggregate net income shown on the return. The same opinion held that the deductions of one spouse, if they exceeded his or her income, could be deducted from the gross income of the other. When the Revenue Act of 1921 was enacted, Section 223 thereof changed the last sentence quoted above to the following form:

"If a husband and wife living together have an aggregate net income for the taxable year of $2,000 or over, * * *

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

The Report of the Ways and Means Committee of the House on the bill (67th Cong. 1st Sess., Report No. 350) stated:

"Section 231 of the bill proposes to amend Section 223 of the present law in such a manner as to clear up the doubt now existing as to the right of husband and wife in all cases to make a joint return and have the tax computed on the combined income."

The Report of the Finance Committee of the Senate (Senate Report No. 275, 67th Cong. 1st Sess.) commenting on the change, stated:

> "It also is made clear that husband and wife may make a joint return even though one or both have incomes large enough to be subject to surtaxes."

It seems obvious that this change was merely an incorporation in the statute of the principles announced in the Solicitor's ruling and that it was intended to confer a privilege. Certainly Congress must have realized that only the most confirmed patriot would file a joint return which subjected the combined income to a higher surtax than would be payable in case separate returns were filed. Congress must, therefore, have intended to confer some benefit. The statements of the House and Senate Committees quoted above seem to bear out this inference.

It is significant to note here that the provision of the statute reads:

> "If a husband and wife living together have an *aggregate net income* for the taxable year of $2,000 or over * * *
>
> (2) The income of each shall be included in a single *joint* return, in which case the tax shall be computed on the aggregate income." (Italics supplied.)

The statute does not use the words *"aggregate net incomes"* or *"aggregate incomes"*. Moreover, the word "joint" must be given some weight for if, as the Government contends, this statute means only that two separate returns may be put on one piece of paper, then the word "joint" means nothing. The words used in the statute

clearly suggest the idea of a single net income and if Congress meant anything else, it certainly chose very inappropriate words to express its purpose.

On February 22, 1922, the Treasury Department issued Regulations No. 62 under the Revenue Act of 1921 (42 Stat. 227), which Regulations contained the following language in Article 401 thereof:

> "Where the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income."

There is nothing to indicate that this regulation was intended as a modification of Sol. Op. 90, *supra*. So far as we have been able to discover, Sol. Op. 90 has never been specifically revoked. Indeed, after the promulgation of the above Article 401, the Commissioner published other rulings wholly consistent with Sol. Op. 90 which would indicate that he did not regard the regulation as overruling the principles laid down in Sol. Op. 90 (See I. T. 1997 III-1 C. B. 149, 1924). In 1933, the Commissioner was asked whether capital losses of a husband could be offset against similar gains of the wife on a joint return. He replied that:

> "• • • the loss sustained by the husband would offset the same amount of gain realized by the wife from such source." (CCH Fed. Tax Service 1933 III Par. 6037.)

As late as 1935, Government counsel conceded that a business loss of a husband for the year 1930 could be deducted from similar income of the wife on a joint return for the same year under the corresponding provisions of the Revenue Act of 1928 and the regulation above quoted

(*Van Vleck* v. *Commissioner*, 80 Fed. [2d] 217, 218, certiorari denied 298 U. S. 656). The Court refused to allow a statutory net loss of the husband for a prior year to be set off against the wife's income for the year 1930. The latter decision was based on another specific provision of the Act dealing with statutory net losses.

The Commissioner is certainly presumed to know the language of his own regulations and it seems inconceivable that he would have issued, published and allowed the rulings referred to above to remain outstanding if he had regarded them as contrary to Article 401 of Regulations 62 quoted above, or that his counsel would have conceded the point in the *Van Vleck* case, *supra*, had he regarded it as contrary to the Regulation.

The language of the above quoted statute of 1921 has been carried in identical form in all of the later income tax acts except that the amount of the personal credit has varied (Section 223, Revenue Acts of 1924 and 1926 and Section 51, Revenue Acts of 1928, 1932, 1934 and 1936). The provisions of the Revenue Act of 1934 which govern this case are set forth in full at pages 3 and 4 of this brief. The identical language of the Regulation quoted above has been found in the Regulations under each of these acts since 1921 (Art. 401, Regs. 65 and 69; Art. 381, Reg. 74; Art. 281, Reg. 77; and Art. 51-[1], Regs. 86 and 94).

The Court of Appeals for the Fifth Circuit in *Commissioner* v. *Thomas*, 84 Fed. (2d) 562 (1936), commenting on Section 51 of the Revenue Act of 1932, stated:

> "Section 51, *supra*, is clearly intended by Congress to be in favor of the taxpayer. Therefore, it should be liberally construed to effectuate that intention. As applied to this case, the plain, common sense meaning of the provision 'the tax shall be computed on the aggregate income' is that the income of the spouses is to be added together and losses sustained by either or both of them are to

be deducted from that aggregate in determining the net taxable income."

In *Pierce* v. *Commissioner,* 100 Fed. (2d) 397 (1938) Circuit Judge Learned Hand in a dissenting opinion made the following statement about Section 51 of the Revenue Act of 1932:

> "When §51(b) (2) requires the tax to be computed on the net aggregate income, it means the balance found by adding together all those items of gross income, which both spouses would be obliged to enter on both their separate returns, and subtracting all those deductions, which the statute allowed to both upon such returns."

In *Commissioner* v. *Rabenold,* 108 Fed. (2d) 639, C. C. A. 2nd (1940), Judge Patterson in a dissenting opinion said:

> "The respondents, husband and wife, saw fit to file a single joint income tax return for 1933. The Revenue Act of 1932, like prior acts, gave them the right to file 'a single joint return' and declared that in such case 'the tax shall be computed on the aggregate income.' The obvious result, it seems to me, is that husband and wife who file a single return are to be treated as a single taxpayer and are jointly liable for the tax, * * * Since 1918 the form of return used by husband and wife jointly has been the same form as that used by a single person, and it has no spaces for separation of items between husband and wife."

These statements, it seems to us, interpret the statute in the manner intended by Congress and in conformity with the consistent construction placed on the statute and the

regulation by the Commissioner from 1921 until at least 1934.

The text books generally accepted the same view. See Klein, Federal Income Taxation (1929) Par. 37:5(b), where the writer states:

> "Where the spouses elect to file a joint return, they are regarded as a single taxpayer, and the tax is computed on the aggregate or combined income. All deductions and credits to which either the husband or wife is entitled are to be deducted from the combined income.* Where in the case of a joint return either husband or wife has allowable deductions for the taxable year in excess of his or her separate gross income for that year, such excess may be deducted from the net income of the other spouse for the purpose of computing both the normal tax and surtax."**

Holmes, Federal Taxes, Sixth Edition (1925) contains the following statement at page 1289:

> "If a husband or wife has allowable deductions for any taxable year in excess of his or her gross income for such year, such excess may, if the husband and wife are living together and a single return is filed, be deducted from the net income of the other spouse for the purpose of computing both the normal and the surtax." (Citing the same rulings and regulations referred to by Klein, *supra.*)

There was never any provision in any of the regulations prior to 1934 which attempted to limit the charitable deduction on a joint return to 15% of the net income of each spouse. When Regulations 86, issued under the

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*I. T. 1997, C. B. III-1, 149; Reg. 74, Art. 381; Art. 401, Regs. 69, 65 and 62.

**Sol. Op. 90, C. B. 4, 236.

Revenue Act of 1934, were promulgated in February, 1935, there appeared for the first time the following language in Article 23(o)-(1):

> "Whether a husband and wife make a joint return or separate returns, the 15% limitation on deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts."

There was no change in the language of Section 51 of the Revenue Act of 1934 or in Section 23(o) of the same Act which warranted this addition to the regulation. It was apparently based on the decision of the Board of Tax Appeals in *Gummey* v. *Commissioner*, 26 B. T. A. 894, published in 1932, which held that in computing the tax due on a single joint return of husband and wife, each should be treated as an individual taxpayer in applying the provisions of Section 118 of the Revenue Act of 1928, which Section dealt with disallowance of losses of a person purchasing identical securities within 30 days after sale. Whether that decision is right or wrong, it does not seem to us to be a necessary or logical conclusion to be drawn from it that Section 51 of the Revenue Act of 1934 confers no privilege with respect to a joint return and that such return must be dealt with exactly as if it were a separate return of each spouse.

Counsel for the Government in the argument below lays great stress upon the provisions of Article 51-1 of Regulations 86 which provides that:

> "If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income."

He particularly emphasizes the language "all deductions * * * to which either is entitled * * *". To quote this obviously ambiguous regulation in support of his interpretation of the meaning of the statute without giving consideration to the interpretation of it which the Commissioner had lulled the public into accepting for nearly 14 years simply begs the question.

But, argues the Government, I. T. 1997, *supra* (1924), upon which we put reliance, was revoked by I. T. 2428 XIII-2 C. B. 293 (1934). This proves the very point which we have been making, namely, that without change in the statute to warrant it, the Commissioner sought in 1934 to adopt an interpretation of his regulation and the statute inconsistent with the interpretation which he had placed on the same regulation from 1921 to 1934.

> "Treasury Regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received Congressional approval and to have the effect of law." (*Helvering* v. *Winmill*, 305 U. S. 79; Citing *U. S.* v. *Dakota Montana Oil Company*, 288 U. S. 459, 466; *Helvering* v. *R. J. Reynolds Tobacco Company*, 306 U. S. 110.)

We are not here dealing with a change in the wording of the statute such as was involved in *Helvering* v. *Wilshire Oil Co., Inc.*, 308 U. S. 90 (1939), where the Court held that the change in the statute warranted the change in the regulations.

There has been considerable discussion in the various cases involving joint returns of husband and wife as to whether or not they are a single taxpayer (See *Pierce* v. *Commissioner, supra; Janney* v. *Commissioner*, 108 Fed. [2d] 564; *Commissioner* v. *Thomas, supra; Commissioner* v. *Rabenold, supra.* While as pointed out above we think

the language of the statute leads to the conclusion that Congress regarded them as a single taxpayer, we do not regard that issue alone as completely determinative of this case. There is nothing inconsistent in the idea that Congress may have conceived of husband and wife filing a joint return as two separate taxpayers and still may have intended that they should enjoy the benefits of pooling income and deductions on a joint return. Congress has always granted a larger personal credit to husband and wife living together than it has to two individuals living apart, which is indicative of its attitude toward the family group. In the earlier acts Congress allowed affiliated corporations to file consolidated returns, wherein the group income was taxed as a unit, but it does not follow from that that all the corporations were a single corporate taxpayer. *Van Vleck* v. *Commissioner*, 80 Fed. (2) 217, 218. Why should it be assumed without specific words to that effect that in granting the right to file joint returns no benefit was intended by way of combined deductions as well as combined income even though they might be regarded as separate taxpayers? Certainly the income tax acts have never stated that they were not to have such benefit. The Commissioner's regulation only has decreed that.

Finally, this case involves a deduction for charitable gifts. No question has ever been raised that the gifts were not to charitable institutions and this Court as late as 1939 in *U. S.* v. *Pleasants*, 305 U. S. 357, stated:

> "We observed in the *Bliss* case that the exemption of income devoted to charity and the reduction of the rate of tax on capital gains 'were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed'. That observation is equally pertinent here."

So ought it to be in the instant case.

CONCLUSION.

The decision of the United States Circuit Court of Appeals, Second Circuit, should be reversed.

Dated: New York, N. Y., October 30, 1940.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 183

HENRY W. TAFT AND JULIA W. S. TAFT.
PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the granting of a writ of certiorari in this case, limited to the second question presented in the petition for a writ of certiorari.

1. The second question presented in the petition is whether, when husband and wife file a joint income-tax return, the limitation on the deduction for contributions to charities to 15 percent of the taxpayer's net income must be computed with reference to the separate net incomes of the husband and wife, or whether it may be computed on their combined net income. As stated in the petition,

the decision of the court below upon this question is in substantial conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Janney* v. *Commissioner*, 108 F. (2d) 564, certiorari granted April 29, 1940, No. 843 last Term (No. 36 this Term).

2. The first question stated in the petition is whether husband and wife who file a joint income-tax return are a single taxpayer or are two separate and distinct taxpayers. This general question will be answered by the decision of the second question presented in the petition, insofar as it is material to the case at bar.

3. The third question presented in the petition is whether the Board Member erroneously barred certain evidence from the record. The rejected evidence related to the action of the Commissioner of Internal Revenue in allowing, or in failing to disallow, deductions for charitable contributions taken by the taxpayers in their returns for earlier years and apparently computed according to the method held improper by the court below. The refusal to receive this evidence seems clearly correct. This Court has said that even published rulings of the Bureau of Internal Revenue "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law." *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468. And it has never been held that action taken by the Commissioner with respect to an individual taxpayer,

which could not serve to acquaint either Congress or taxpayers generally with the Treasury practice, is entitled to any consideration at all. Compare *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 52–53. Were the rule otherwise the breadth of the permissible fields of inquiry in tax litigation would place an intolerable burden on the Treasury.

4. The fourth question presented in the petition is whether, under the peculiar circumstances of this case, the husband was, in fact and in substance, the donor of these gifts and hence the "taxpayer" within the meaning of the statute. Petitioners' contention under this head is that "the wife was merely the agent of the husband or the conduit through which his income flowed to charitable uses" (Pet. 14). This question is avowedly peculiar to this case, and there is no reason for this Court to review it. Moreover, the Board's conclusion is amply supported by the evidence to which it refers in its opinion (R. 19–20).

CONCLUSION

For the foregoing reasons it is submitted that if this Court grants the petition it should limit the writ to the second question presented in the petition.

Respectfully submitted.

ROBERT H. JACKSON,
Attorney General.

JULY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 183

HENRY W. TAFT AND JULIA W. S. TAFT, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10) is reported at 40 B. T. A. 229. The *per curiam* opinion of the Circuit Court of Appeals (R. 37) is reported in 111 F. (2d) 145.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 8, 1940 (R. 37–38). The petition for a writ of certiorari was filed June 26, 1940, and was granted October 11, 1940, limited to the

second question presented (R. 39). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when husband and wife file a joint income-tax return, the limitation on the deduction for contributions to charities to 15 percent of the taxpayer's net income must be computed with reference to the separate net incomes of the husband and wife, or whether it may be computed on their combined net income.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix.

STATEMENT

The petitioners are husband and wife, and reside in New York City, New York. For each of the calendar years 1934 and 1935 they filed joint income-tax returns (R. 11).

Petitioners' return for 1934 showed an aggregate net income of $83,682.99. In arriving at this net income a deduction of $2,852 was taken from gross income on account of contributions made by both petitioners during the year to charities. Of this sum deducted, $1,477 represented contribu-

tions made by the wife, and the balance represented contributions made by the husband. The wife's net income for the year, computed without reference to such contributions, was $12.10 (R. 11).

The petitioners' return for 1935 showed an aggregate net income of $92,374.59, after deducting $2,715.80 for charitable contributions made in the year. Of this latter sum, $1,545.80 represented contributions made by the wife and the balance contributions by the husband. The wife's net income in 1935, computed without reference to such contributions, was $15.30 (R. 11).

In auditing the returns the Commissioner ruled that the deductions for charitable contributions claimed on account of the wife's contributions must be reduced to 15 percent of her net income. The net result of the Commissioner's adjustments was to reduce the deduction for the wife's contributions in 1934 from $1,477 to $1.81, and the deduction for her contributions in 1935 from $1,545.80 to $2.30 (R. 11–12). The resulting deficiencies against the petitioners were $722.79 for the year 1934 and $827.17 for the year 1935 (R. 6–9).

The Board of Tax Appeals sustained the Commissioner (R. 10–15). The Board's decision was affirmed, *per curiam,* by the Circuit Court of Appeals for the Second Circuit upon the authority of the decision of that court in *Pierce* v. *Helvering,* 100 F. (2d) 397 (R. 37).

ARGUMENT

The question presented in this case is in its more general aspects the same as that presented in *Helvering* v. *Walter C. Janney and Pauline F. M. Janney,* No. 36, this Term, to be argued immediately preceding this case. Hence we adopt for this case the general argument made on behalf of the Commissioner of Internal Revenue in the *Janney* case, and discuss here only the questions which are either peculiar to this case or are raised by the petitioners in this case and are not discussed in the brief for the Commissioner in the *Janney* case.

This case arises under Sections 23 (o) and 51 (b) of the Revenue Act of 1934. Section 23 (o) provides that charitable contributions shall be allowed as deductions to an amount which "does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection." Section 51 (b) permits a husband and wife to make a single joint return "in which case the tax shall be computed on the aggregate income." Provisions equivalent to those of Section 23 (o) of the 1934 Act have been included in every revenue act since that of 1918. The provision quoted from Section 51 (b) of the 1934 Act appears in every revenue act since that of 1921.

In the brief for the Commissioner in the *Janney* case it is argued that even though a husband and

wife file a joint return, pursuant to their privilege to do so, this does not make them a single taxpayer for the purpose of computing deductions, and that only those deductions to which either the husband or the wife, separately considered, is entitled under the law, may be taken. If that principle be accepted it is plainly applicable to the present case, and requires that the limitation on the deduction for contributions to charities to 15 percent of the taxpayer's net income must be computed with reference to the husband's and wife's separate net incomes, and not on their combined net income. This result is further indicated here by the wording of Section 23 (o). It limits the allowable deduction to 15 percent of "the taxpayer's net income", and that is a limitation based on the income of the individual taxpayer. Had Congress intended that the limitation be measured by the "taxpayers' net income" where separate taxpayers file a joint return, it could easily have so stated. But, on the contrary, Congress, ever since the Revenue Act of 1918, has employed the term "taxpayer's net income".

Further, whatever doubt might attend the construction of Section 23 (o) if it stood alone is resolved in favor of the interpretation above urged by Article 23 (o)–1 of Regulations 86, promulgated under the Revenue Act of 1934. That article provides in part:

> Whether a husband and wife make a joint return or separate returns, the 15 percent limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts.

This language has been retained in Articles 23 (o) (1) of Regulations 94 and 101, promulgated, respectively, under the Revenue Acts of 1936 and 1938, and in Section 19.23 (o)–1 of Regulations 103, promulgated under the Internal Revenue Code. And, as has been stated, the provisions of Section 23 (o) of the 1934 Act, which this regulation construes, have been preserved in the subsequent statutes. The construction given the statutory provision by the regulation has therefore received the tacit approval of Congress. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Hassett* v. *Welch*, 303 U. S. 303; *Old Mission Co.* v. *Helvering*, 293 U. S. 289, 293, 294; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488.

It cannot be denied that Article 23 (o)–1 of Regulations 86 squarely covers the present case. Petitioners assert, however, that it is inconsistent with the administrative interpretation of the statute which prevailed prior to its promulgation. This

Court has recently pointed out that the rule making power of the Treasury is a continuing one, and that the Treasury may apply to a statutory provision reenacted in a new Act an interpretation different from that which it applied to the same provision in former Acts. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 97, 100–101. Hence, petitioners' contention that Article 23 (o)–1 represented a change from the prior administrative construction could not prevail, in view of subsequent congressional approval of the new regulation, even if it were well founded.

But the claim is not well founded. The only regulations pertinent to the question here at issue which antedated Article 23 (o)–1 of Regulations 86 were the predecessors of Article 51–1 of Regulations 86. That regulation reads in part:

> If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income.

These provisions first appeared in Article 401 of Regulations 62, promulgated under the Revenue Act of 1921, and have been continued in all Treasury Regulations issued since. As fully pointed out in the brief for the Commissioner in the *Janney* case, this regulation supports the argument that

a husband and wife do not lose their identities as separate individual taxpayers by filing a joint return. The crucial language is "all deductions * * * to which either is entitled shall be taken from such aggregate income." The inference from this language is that a deduction is allowable in a joint return only as one spouse or the other, separately considered, would be entitled to it. And since the wife in the instant case, as a separate individual taxpayer, is not entitled to deduct more than 15 percent of her net income for charitable contributions, the amounts in excess of 15 percent which were claimed as deductions on the joint returns were properly disallowed. Thus Article 23 (o)–1 of Regulations 86, far from departing from the prior regulations, was but an amplification and specific application of the general principle already laid down in the regulations.

The petitioners also place great reliance upon Sol. Op. 90, Cum. Bul. No. 4, p. 236 (1921). There the Solicitor of Internal Revenue ruled that under the 1918 Act (which did not provide how the tax was to be computed if a joint return was made) the tax of a husband and wife filing a joint return was to be computed on their net aggregate income, and that the deductions of one spouse, if they exceeded his or her income, could be deducted from the gross income of the other. That opinion, in other words,

upheld the right of husband and wife to pool their deductions and items of income if a joint return was made. Congress approved this view, and inserted in the 1921 Act the provision, retained since, that in the case of joint returns the tax should be computed on the aggregate income. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 17; H. Rep. No. 350, 67th Cong., 1st Sess., p. 13; Hearings before the Senate Comittee on Finance on H. R. 8245, 67th Cong., 1st Sess., p. 74. But the question discussed by the Solicitor and dealt with by Congress was the right to pool deductions in a joint return; here the question is whether the two spouses are to be treated as one person for the purpose of ascertaining what deductions may be entered in such a return. Sol. Op. 90 throws no light on that question. The passages from texts which the petitioners quote (Br. 10) likewise show that the petitioners confuse the right to pool deductions with the question whether deductions are to be computed as if husband and wife were one person; the quoted passages deal only with the former.

Similarly mistaken is petitioners' reliance (Br. 7–8) upon a supposed concession by the Government in *Van Vleck* v. *Commissioner*, 80 F. (2d) 217 (C. C. A. 2d), certiorari denied, 298 U. S. 656. There, in the course of an opinion dealing with a

different question, the court recited that the husband's net loss for 1930 had been deducted from the wife's income in that year, and that the right to take that deduction had not been questioned. 80 F. (2d) at 217, 218. Petitioners cite the allowance of this deduction as inconsistent with the provisions of a predecessor of Article 51–1 of Regulations 86. The loss of the husband referred to in the *Van Vleck* opinion was a "net business loss" sustained in the husband's regular business of buying and selling securities, and the 1928 Act, under which that case arose, contained no limitation on the deduction of such a loss. Hence the case, in that aspect, involved but a pooling of deductions and the right to do so was sustained, not denied, by the regulation. And the court so recognized. 80 F. (2d) at 218.

I. T. 1997, III–1 Cum. Bull. 149 (1924), also relied on by petitioners, was revoked by I. T. 2824, XIII–2 Cum. Bul. 293 (1934). Further, as explained at pp. 6–7, of the brief for the Commissioner in the *Gaines* case, No. 113, argued herewith, the position taken by the Bureau in I. T. 1997 was not inconsistent with adherence to the general principle that husband and wife remain separate persons for purposes of computing deductions in a joint return.

CONCLUSION

For the reasons stated in the brief for the Commissioner in the *Janney* case and herein it is submitted that the decision below is correct and should be affirmed.

Respectfully submitted.

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NOVEMBER 1940.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 4 per centum of the amount of the net income in excess of the credits against net income provided in section 25. (U. S. C., Title 26, Sec. 11.)

SEC. 12. SURTAX ON INDIVIDUALS.

* * * * *

(b) *Rates of Surtax.*—There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual a surtax as follows:

* * * * *

(U. S. C., Title 26, Sec. 12.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(o) *Charitable and Other Contributions.*—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

* * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed with-

out the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. * * *

* * * * *

(U. S. C., Title 26, Sec. 23.)

The provisions of Sections 214 (a) (11) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057) and 1921 (c. 136, 42 Stat. 227), Sections 214 (a) (10) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9), Sections 23 (n) of the Revenue Acts of 1928 (c. 852, 45 Stat. 791) and 1932 (c. 209, 47 Stat. 169), and Section 23 (o) of the Revenue Acts of 1936 (c. 690, 49 Stat. 1648) and 1938 (c. 289, 52 Stat. 447), and the Internal Revenue Code (c. 1, 53 Stat. 12), insofar as here material are the same as the provisions of Section 23 (o) of the Revenue Act of 1934, above quoted.

SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

* * * * *

(b) *Husband and Wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income. (U. S. C., Title 26, Sec. 51.)

The provisions of Sections 223 of the Revenue Acts of 1921, 1924, and 1926, and Sections 51 of the Revenue Acts of 1928, 1932, 1936, and 1938, and of the Internal Revenue Code, insofar as here material are the same as the provisions of Section 51 of the Revenue Act of 1934, above quoted.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 23 (o)–1. Contributions or gifts by individuals.—
>
> * * * * *
>
> Whether a husband and wife make a joint return or separate returns, the 15 percent limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts. (See article 51–1.)

Articles 23 (o)–1 of Regulations 94 and 101, promulgated under the Revenue Acts of 1936 and 1938, respectively, and Section 19.23 (o)–1 of Regulations 103, promulgated under the Internal Revenue Code, contain language identical with the above excerpt from Article 23 (o)–1 of Regulations 86.

> ART. 51–1. Individual returns.—
>
> * * * * *
>
> A husband and wife living together for the entire year need make no returns unless their aggregate gross income for the taxable year is at least $5,000, or their aggregate net income is at least $2,500. If their aggregate net income for the taxable year is $2,500 or more, or their aggregate gross income is $5,000 or more, either each must make a return, or the income of each must be included

> in a single joint return. * * * If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income. * * *
>
> * * * * * *

Articles 401 of Regulations 62, 65, and 69, promulgated under the Revenue Acts of 1921, 1924, and 1926, respectively, Articles 381 of Regulations 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, respectively, and Article 51–1 of Regulations 94, promulgated under the Revenue Act of 1936, contain provisions which are the same as the above-quoted provisions of Article 51–1 of Regulations 86. The quoted provisions are retained in substance, with some amplification, in Article 51–1 (b) of Regulations 101, promulgated under the Revenue Act of 1938, and in Section 19.51–1 of Regulations 103, promulgated under the Internal Revenue Code.

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SUPREME COURT OF THE UNITED STATES.

No. 183.—October Term, 1940.

Henry W. Taft and Julia W. S. Taft, Petitioners, *vs.* Guy T. Helvering, Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 9, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioners, husband and wife, filed joint income-tax returns for the years 1934 and 1935. In computing their aggregate net income under Section 51(b) of the Revenue Act of 1934,[1] they made deductions of their combined charitable contributions.[2] The Commissioner ruled that the deductions on account of the wife's charitable contributions should be reduced to 15 per cent of her separate net income and deficiences were determined accordingly. The Board of Tax Appeals sustained the Commissioner (40 B. T. A. 229) and the Circuit Court of Appeals affirmed. 111 F. (2d) 145.

Because the question is cognate to that presented in the cases of *Helvering* v. *Janney*, No. 36, and *Gaines* v. *Helvering*, No. 113, decided this day, we granted certiorari. October 14, 1940.

The provision for joint returns in Section 51(b) of the Revenue Act of 1934 was in substantially the same form as the corresponding provision in the prior revenue acts from 1921. The import of that provision is that in making a joint return the husband and wife should report their aggregate gross income and could combine their deductions in reporting their aggregate net income upon which the tax was to be computed. That was the construction placed upon the original provision for joint returns, in the Revenue Act of 1918, by the Solicitor of Internal Revenue. He said in his ruling: "If a single joint return is filed it is treated as the return

[1] 48 Stat. 697.

[2] Section 23(o), 48 Stat. 690.

of a taxable unit and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual. In cases, therefore, in which the husband or wife has allowable deductions in excess of his or her gross income, such excess may, if joint return is filed, be deducted from the net income of the other for the purpose of computing both the normal and surtax".[3] We think that this was the intention of Congress in enacting the Act of 1921[4] and the later acts containing the same provision for joint returns. We think that it was also the fair import of the Treasury Regulations under the Act of 1921 and of subsequent regulations prior to 1934.[5]

Respondent places emphasis on the phrasing of Article 401 of Regulations 62 under the Act of 1921, that "in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income". The argument stresses the words "to which either is entitled" and it is urged that each spouse is entitled only to deduct 15 per cent of his or her separate net income. But we think that this is an inadmissible construction of the statute and is not a necessary construction of the regulation. Such a construction is inconsistent with the premise of the Solicitor's opinion, above mentioned, that a joint return "is treated as the return of a taxable unit" and the tax is to be laid as though the return were that "of a single individual". The more specific language of the provision in the Act of 1921, which for the present purpose is the same as that in the Act of 1934, affords a stronger basis for this conclusion. It provides specifically for the inclusion of the income of each spouse "in a single joint return" and in that case that "the tax shall be computed on the aggregate income". The principle that the joint return is to be treated as the return of a "taxable unit" and as though it were made by a "single individual" would be violated if in making a joint return each spouse were compelled to calculate his or her charitable contributions as if he or she were making a separate return. The principle of a joint return permitted aggre-

[3] Sol. Op. 90, Cum. Bull. No. 4, p. 236 (1921). See Helvering *v.* Janney, No. 36, decided this date.

[4] House Rep. No. 350, 67th Cong., 1st Sess.; Sen. Rep. No. 275, 67th Cong., 1st Sess.

[5] Treasury Regulations Nos. 65 and 69, Art. 401; Regulations Nos. 74 and 77, Art. 381.

gation of income and deductions and thus overrode the limitations incident to separate returns. We find no indication in Article 401 of Regulation 62 under the Act of 1921 of any intention to depart from the Solicitor's view as to the purport of the statute.

In 1935, by Article 23(o)-1 of Treasury Regulations 86, the Department sought to require a husband and wife, whether they make "a joint return or separate returns", to base their deduction for charitable contributions on the separate net income of the spouse making them. We are of the opinion that under the Revenue Act of 1934, taken with the meaning we think it had when enacted, petitioners were entitled to the combined deductions they claimed, and that the departmental regulation to the contrary was ineffective to deprive them of that right.

The judgment of the Circuit Court of Appeals is reversed.

Mr. Justice ROBERTS took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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